

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER**

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UNITED STATES OF AMERICA,	)	
Complainant,	)	8 U.S.C. § 1324a Proceeding
	)	
v.	)	OCAHO Case No. 98A00023
	)	
REBECCA FISH, INC.,	)	Judge Robert L. Barton, Jr.
Respondent.	)	
_____	)	

**PREHEARING CONFERENCE REPORT AND ORDER**

*(February 25, 1998)*

As previously arranged with the parties, a telephone prehearing conference was conducted yesterday morning. INS Assistant District Counsel Paul Szeto appeared for Complainant, and Respondent's owner, Louis Ventafredda, appeared for Respondent. The purpose of the conference was to discuss, among other things, the issues raised, including the issue of whether the individuals listed in the Complaint were independent contractors, the need for discovery, and the potential for settlement. This Report and Order will serve as a summary of the discussion that occurred during the conference.

The Complaint, filed on November 17, 1997, consists of a single count in which Complainant alleges that Respondent failed to prepare or failed to make available for inspection the employment eligibility verification forms (I-9 forms) for twenty-eight named individuals. See Compl. ¶¶ I.A-E. I noted at the beginning of the conference that, although the Complaint contains twenty-eight names, the phrase that introduces the count refers to thirty-one individuals. Mr. Szeto stated that Complainant originally had planned to charge Respondent with respect to thirty-one individuals, but that it decided not to include three of those people in the Complaint. Therefore, Mr. Szeto said, twenty-eight is the correct number of people listed in the Complaint.

I noted that Respondent's Answer, filed on January 23, 1998, contains a general denial of the allegations made in the Complaint; in its Answer, Respondent denies every allegation in the Complaint, including the allegations regarding the parties and the jurisdiction of this tribunal to hear the case. A general denial is inappropriate unless a respondent truly wishes to deny every single element of a complaint. Mr. Ventafredda clarified Respondent's actual position regarding the Complaint's allegations. Mr. Ventafredda said Respondent does not deny that it is a corporation duly organized under the laws of the state of New York, but he noted that the address listed for

Respondent in the Complaint no longer is correct.<sup>1</sup> Mr. Ventafredda said Respondent also does not deny that the Office of the Chief Administrative Hearing Officer (OCAHO) has jurisdiction over this cause of action, or that Respondent was served with a Notice of Intent to Fine.

Regarding the Complaint's substantive allegations, Mr. Ventafredda said the twenty-eight named individuals performed work for Respondent as fishermen, but that they were independent contractors rather than employees,<sup>2</sup> see also Ans. at 1. Mr. Ventafredda said he does not deny that Respondent did not prepare I-9 forms for the twenty-eight people listed in the Complaint. Mr. Ventafredda said he did not know what an I-9 form was until the present case. He also stated that Internal Revenue Service 1099 forms, not W-2 forms, were prepared for each of the twenty-eight people in question.

It appears that the only remaining issue, at least as to liability, is whether the twenty-eight workers were employees of Respondent or independent contractors. Mr. Szeto asserted that the following factors indicate that the twenty-eight workers should be classified as employees: Respondent controlled their work schedules and fishing times; Respondent provided their food and accommodations while on fishing trips; Respondent told them what time to report for work; Respondent controlled how many days they were out on a fishing trip; and the workers were paid based on the amount of the catch, but on at least one occasion they were paid even though there was no catch. Mr. Szeto added that he intends to conduct discovery to try to find more facts that will support Complainant's position.

Mr. Ventafredda said all twenty-eight people worked as fishermen on his boat, but that none of them are performing work for him at the present time. He said his payroll records indicate the periods in which those people worked on his boat, and that he has provided those payroll records to Complainant.

Mr. Szeto said he has a copy of Respondent's payroll worksheets, which include dates of hire and termination for each worker. Mr. Szeto said the payroll records contain no indication of the number of hours per week that each person worked. He said he has copies of Respondent's 1099 forms, which show the amount each person was paid per year. He added that Complainant has statements from three individuals, Alexander Efremov, Vyacheslaz Golovitskiy and Roman Kurilkin, stating that they were paid each week. Mr. Szeto confirmed, however, that those three individuals are not listed in the Complaint. He explained that Complainant does not have documentary evidence regarding the twenty-eight people named in the Complaint because they were not current workers at the time of the INS inspection, which occurred on January 29, 1997. Mr. Szeto

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<sup>1</sup> Respondent previously had notified my office of its change in address. Respondent's current address appears in the attached Certificate of Service.

<sup>2</sup> Relevant past cases concerning this issue are United States v. Hudson Delivery Service, Inc., 7 OCAHO 945 (1997), 1997 WL 572126, aff'd by CAHO, July 3, 1997, and United States v. Bakovic, 3 OCAHO 853 (Ref. No. 482) (1993), 1993 WL 404247.

said the inspection was conducted by Special Agent Palmese and one other INS agent. I stated that I would want to know exactly what documents the agents asked to see at the inspection.

Mr. Szeto said he has a one-page report prepared on February 3, 1997, by INS Special Agent Mark Essing after a conversation with Mr. Ventafredda in which Mr. Ventafredda allegedly discussed his practices of dealing with the workers he hired. Mr. Szeto said he plans to have Special Agent Essing testify at trial. Mr. Szeto said he has a total of three reports that he plans to offer into evidence, and that he has not yet provided Respondent with copies of those reports.

Regarding the factors Mr. Szeto listed in support of Complainant's argument that the twenty-eight individuals were employees rather than independent contractors, Mr. Ventafredda said Respondent did not provide food and ice for the fishermen. Mr. Ventafredda said his fishing vessel, the *Rebecca*, is just a work site, and that the weather largely dictates the timing of fishing trips. He confirmed that workers are paid based on the amount of the catch, stating that workers receive an amount based on a percentage of the catch after the boat takes its share and after expenses for groceries and ice are covered. In response to Mr. Szeto's claim that Respondent paid workers on one occasion when there was no catch, Mr. Ventafredda said that sometimes there is a dry spell in which there is no catch, and that, during those periods, he will give some money to people who work for him out of humanitarian considerations. Mr. Ventafredda said the amount he gives varies depending on the person. He stated that those sums always come out of his own pocket, and that he does not include them in the 1099 forms.

Mr. Ventafredda said he takes at most four workers at a time out with him on a fishing trip to handle the fish. He said the first thing he does on a trip is to designate duties for the workers; one person will serve as first mate, another is assigned to repair the nets, one is placed in charge of the galley, and the last is responsible for mechanical matters. Mr. Ventafredda said he looks for seaworthy people who are experienced fishermen. He said workers go from boat to boat looking for work, and that his people work trip by trip, so that it is possible that a particular worker could work only one trip for Respondent. Mr. Ventafredda said he has records that show how many trips the twenty-eight people named in the Complaint took with him, and that every paycheck represents a trip. Mr. Ventafredda said a short fishing trip usually lasts three or four days, while a long trip can last eight or nine days.

Next, I discussed with the parties the need for discovery. Complainant must provide Respondent with copies of the three reports noted previously on or before March 10, 1998. I also noted that Complainant, at some point, will have to provide Respondent with copies of any other written evidence it plans to introduce at trial. Mr. Szeto said that, in addition to the three reports, there are other documents he would like to send to Respondent at this time. Mr. Szeto said he probably will need to conduct discovery in the form of requests for admissions and requests for production of documents. Mr. Ventafredda said he could not think of any information he needs from Complainant to prepare Respondent's case.

I ordered that any discovery Complainant wants to conduct first must be made in the form of a request that Respondent voluntarily provide the information. If Complainant requests certain

documents from Respondent, Respondent only must make the documents available for Complainant to copy at Complainant's expense. If Respondent does not voluntarily provide requested information, then Complainant may make any formal discovery requests. However, I ruled pursuant to 28 C.F.R. § 68.18(c)(2) and (3) that any formal discovery requests first must be submitted to me for approval before they are served on Respondent. I will review any formal discovery requests, and, if I approve them, will forward them to Respondent to answer. Thus, any formal discovery must receive prior court approval, but any informal discovery may be conducted without court involvement.

Mr. Szeto said he needs until May 8, 1998, to complete discovery. I approved that deadline; therefore, any discovery in this case must be concluded on or before May 8. That means Complainant shall time its discovery requests, both informal and formal requests, so that Respondent will have time to answer them by May 8.

I also discussed with the parties the possibility of settlement. The parties did not reach a settlement agreement during the conference, but Mr. Szeto agreed to check with his supervisors to see if they would approve a potential agreement in which Respondent would not have to admit any violations of the law or that the individuals names in the Complaint were employees. I noted that the U.S. Attorney's Office for the Southern District of New York had included a similar term in a recent settlement regarding one of my prior cases, United States v. Hudson Delivery Service, Inc., 7 OCAHO 945 (1997), 1997 WL 572126, that was appealed to the Second Circuit. A copy of that proposed settlement agreement is attached to this Report and Order, particularly for Complainant's reference. I ordered Complainant to file<sup>3</sup> a written status report within one week of the conference regarding whether Complainant would accept a settlement agreement in which Respondent admits no legal liability; therefore, Complainant's status report is due in my office no later than March 3, 1998.

If the parties reach a tentative settlement agreement, Complainant should call my office immediately and notify me of that development. I also stated that I would be happy to conduct another conference at the parties' request, if they believe my participation would facilitate a settlement.

In the event that this case proceeds to trial, Mr. Szeto said Complainant expects to call three to five witnesses. Mr. Ventafredda said he would be the sole witness for Respondent. If a trial is required, I will try to make it as convenient as possible for the parties. If it is possible to secure a court room on Staten Island, I would plan to conduct the trial there. Otherwise, the trial probably would be held either in Manhattan or northern New Jersey.

All requests for relief, including requests for an extension of time, shall be submitted in the form of a written motion, not a letter. A party seeking an extension of time is required to attempt

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<sup>3</sup> "File" means that the document must be received in my office by the given date, not that it merely must be postmarked by then. See 28 C.F.R. § 68.8(b) (1997).

to confer with the opposing party to secure that party's agreement to the extension before filing its motion for an extension and must state in the motion that it has done so. Motions for an extension of time shall be submitted prior to the due date of the submission and shall include a proposed order.

If either party objects to any part of this Report and Order on the ground that it does not accurately reflect the statements made at the conference, such objection shall be filed and served on or before March 9, 1998. Such objections should not be merely requests for reconsideration. Rather, they should be filed only if this Report and Order does not accurately reflect the ruling.

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**ROBERT L. BARTON, JR.**  
**ADMINISTRATIVE LAW JUDGE**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of February, 1998, I have served the foregoing Prehearing Conference Report and Order on the following persons at the addresses shown, by first class mail, unless otherwise noted:

Paul Szeto  
Assistant District Counsel  
Immigration and Naturalization Service  
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(Counsel for Complainant)  
(By FAX and first class mail)

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